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No. 83-508

In the Supreme Court of the United States

OCTOBER TERM, 1983

FOOD LION, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding an Equal Employment Opportunity Commission regulation which provides that private parties may not demand the issuance of a subpoena during the investigatory stage of the Title VII enforcement process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A30) is reported at 708 F.2d 920. The opinion of the district court (Pet. App. A62-A75) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1983. A petition for a writ of certiorari was filed on September 24, 1983. A petition for rehearing was denied on June 28, 1983 (Pet. App. A2). The jurisidiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 11, 1979, Ethel Bent Walsh, then a Commissioner of the Equal Employment Opportunity Commission, filed a charge against petitioner alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. V) 2000e *et seq.* (Pet. App. A7). During the course of the

Commission's investigation into the charge, petitioner refused to produce any of the information requested by the Commission and requested that the Commission issue a subpoena duces tecum on its behalf "to compel the testimony of Commissioner Walsh concerning the factual basis of the charge" (Pet. App. A7). On March 31, 1980, the Commission, relying on 29 C.F.R. 1601.16(a)3, denied petitioner's request.[1]

The Commission ultimately subpoenaed the employment information withheld by the petitioner, and the petitioner, in turn, sought administrative revocation of the subpoena (Pet. App. A8). While its revocation petition was pending, the petitioner brought this action to compel the Commission to issue a subpoena duces tecum requiring Commissioner Walsh to submit to a deposition (*id.* at A9). Petitioner alleged that Commissioner Walsh's testimony was necessary "to resist any EEOC attempt to enforce its subpoena" (*ibid.*).

Petitioner's administrative revocation petition was subsequently denied, and the Commission, on April 1, 1981, filed an action to enforce its subpoena (Pet. App. A9). That action was subsequently dismissed, when petitioner agreed to comply with the Commission's subpoena (*id.* at A10).

Nothwithstanding its compliance with the Commission's subpoena, petitioner continued its efforts to compel Commissioner Walsh's testimony (Pet. App. A10). The district court, however, granted the Commission's motion for summary judgment (Pet. App. A62-A75). The court rejected

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[1] 29 C.F.R. 1601.16(a)(3) provides in pertinent part:

> Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

petitioner's assertion that Section 710 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-9, requires the Commission to issue subpoenas to private parties during the investigatory stage of the Title VII enforcement process.[2] The court held that 29 C.F.R. 1601.16(a)(3), which provides that the Commission will not issue subpoenas to charging parties or respondents during its investigation, is fully consistent with congressional intent.[3]

The court of appeals affirmed (Pet. App. A30). The court noted that Section 710 incorporates the provisions of Section 11 of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 161, which consistently has been interpreted as not requiring "the issuance of investigative subpoenas to private parties" (Pet. App. A23). The court concluded that the legislative history of Section 710 clearly indicates that "the EEOC, like the NLRB, would not be required to issue investigative subpoenas under that section" (*id.* at A24).

The court of appeals also recognized that the issuance of subpoenas to respondents during Commission investigations could lead to undue delay in the enforcement of Title VII. The court stated that (Pet. App. A29):

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[2]42 U.S.C. 2000e-9 provides:

> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply.

29 U.S.C. (& Supp. V) 161 provides in pertinent part:

> The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application.

[3]The district court also held, in the alternative, that it lacked subject matter jurisdiction over petitioner's action. The court of appeals reversed this portion of the district court's judgment (Pet. App. A11).

> [t]he prospect of extensive delay in EEOC investigations, a risk especially inherent in private party subpoenas of EEOC officials, is a significant consideration in our decision inasmuch as we believe that 29 C.F.R. § 1601.16(a) properly and necessarily shields Title VII's enforcement scheme from such extensive delay.

Relying on *EEOC* v. *K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982), the court concluded that discovery by private parties during a Commission investigation would be appropriate only where the respondent makes a substantial showing that enforcement of a subpoena would be an abuse of the court's process (Pet. App. A28). The court of appeals held that, since there was no such showing here, discovery was not appropriate (*id.* at A29).

ARGUMENT

Further review of the question presented by petitioner is not warranted because, as petitioner acknowledges (Pet. 6), "[t]here is no conflict in the circuits on this issue." In fact, the court below is the only court of appeals that has addressed the issue, and the two district courts that have addressed the question have reached the same result. See *EEOC* v. *Suburban Transit System*, 28 Fair Empl. Prac. Cas. (BNA) 419 (N.D. Ill. 1982); *EEOC* v. *Goodyear Tire & Rubber Co.*, 21 Fair Empl. Prac. Cas. (BNA) 1631 (N.D. Ohio 1979). The only court of appeals that has addressed the issue in the NLRA context has held that the parallel NLRB interpretation of 29 U.S.C. (& Supp. V) 161 is valid. See *Martins Ferry Hospital Ass'n* v. *NLRB*, 654 F.2d 455 (6th Cir. 1981). See also *Schrementi Bros.* v. *McColloch*, 69 L.R.R.M. 2233 (N.D. Ill. 1968). Moreover, the court of appeals' ruling assists in the efficient administration of the law, and its construction of 29 U.S.C. (& Supp. V) 161, as incorporated by Section 710 of Title VII, is in complete harmony with the interpretation of both agencies that utilize the statute.

1. Petitioner asks this Court mechanically to apply a single sentence from 29 U.S.C. (& Supp. V) 161 to reach a result that is clearly at odds with congressional intent (Pet. 7-11). In construing Title VII, however, the Court should look to the statute as a whole to ascertain congressional intent, thereby giving effect to the legislative will. See *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). A comprehensive, remedial statute such as Title VII must be interpreted to give it the most harmonious, comprehensive meaning possible in light of legislative policy and purpose. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973). Where, as here, petitioner's literal reading of Section 710 leads to a result that is inconsistent with the clear intent of Congress, the words of the statute must be interpreted in light of legislative intent. *United States* v. *Campos-Serrano*, 404 U.S. 293, 298 (1971); *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962); *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *United States* v. *Brown*, 333 U.S. 18 (1948).

In this case, the inescapable conclusion from the legislative history of Title VII is that Congress, in applying 29 U.S.C. (& Supp. V) 161 to Commission investigations, intended to make those investigations subject to the same procedures applicable to NLRB investigations. Congress was undoubtedly aware of the NLRB's practice of not issuing investigative subpoenas on behalf of private parties.[4] Congress, moreover, clearly expressed its approval of

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[4]See NLRB Casehandling Manual § 11770 (1975), which provides in pertinent part (emphasis added):

> *Investigative subpoenas:* During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.
>
> (Since the object of investigative subpoenas is the ascertainment of facts on which administrative decisions may be based, they should not be used *after* a regional decision to issue a complaint

the NLRB practice in enacting Section 710. The Senate report on the legislation which eventually became Section 710 states that the section "accord[s] with the actual practice of the National Labor Relations Board." Section-by-section analysis of S. 2515, 92d Cong., 1st Sess. 40 (1971), *reprinted in Legislative History of the Equal Employment Opportunity Act of 1972*, at 1977 (1972) [hereinafter cited as *Leg. Hist.*].[5]

2. Petitioner's reliance (Pet. 10-15) on differences between the enforcement procedures of Title VII and those of the NLRB is misplaced. Whatever the differences between EEOC and NLRB enforcement procedures, the investigative procedures of both agencies are nearly identical. Upon the filing of a charge of discrimination or an unfair labor practice, the Commission or the NLRB, respectively, conducts an administrative investigation to determine whether an adversarial action should be filed against an alleged perpetrator. During this period, neither agency will issue investigative subpoenas on behalf of private parties. See 29 C.F.R. 1601.16(a)(3); NLRB Case Handling Manual § 11770 (1975). The reason for this is simple and applies with equal force to each agency: the administrative investigation is conducted by the government, not the charging party or respondent. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980).

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unless the Division of Operations Management clearance has been procured).

There is no comparable right to an investigative subpoena available to parties other than General Counsel.

[5]Petitioner dismisses the section-by-section analysis of S.2515 because that bill was not enacted. That analysis, however, clearly demonstrates that Congress was aware of the NLRB's practices regarding the issuance of investigative subpoenas. Moreover, although S.2515 was not enacted, Section 710 was derived unchanged from S.2515. In these circumstances, the plainly stated intent of the drafters of S.2515 should not be disregarded.

Only after completion of the administrative investigation and upon initiation of adversarial proceedings do Title VII and the NLRA differ significantly. Under the NLRA the complaint that initiates an adversarial hearing is filed with the NLRB, 29 U.S.C. 160, whereas under Title VII the Complaint is filed with the appropriate United States District Court, 42 U.S.C. 2000e-5(f).[6] At that point, private parties are, for the first time, permitted to obtain supboenas in both EEOC and NLRB proceedings. See Fed. R. Civ. P. 45.

3. In incorporating 29 U.S.C. (& Supp. V) 161 into Title VII, Congress was not unmindful of the possibiliby that, because of the differences between the enforcement scheme of Title VII as finally amended and the NLRA, not all of the provisions of Section 161 could be mechanically applied to Title VII. The section-by-section analysis of the final version of Section 710 evidences this awareness by stating that 29 U.S.C. (& Supp. V) 161 is applicable to Title VII only "to the extent appropriate." Section-by-Section Analysis of H.R. 1746, 92d Cong., 1st Sess. (1971) and S.2515, *supra*, *reprinted in Leg. His.* 1849, 1775. "Congress thereby conferred discretion upon the EEOC to promulgate appropriate guidelines for the use of 29 U.S.C. § 161 powers in EEOC investigations" (Pet. App. A26). The regulation challenged by petitioners is clearly within the legitimate scope of that discretion.

As found by the court of appeals (Pet. App. A27-A29), issuance of investigative subpoenas on behalf of interested parties at the very outset of the EEOC's administrative

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[6]In 1972, when Section 710 was first proposed, Congress contemplated the conferral of cease and desist authority upon the Commission, similar to that of the NLRB. Title VII as amended, however, did not include that authority, but instead provided for formal enforcement actions in federal district court. 42 U.S.C. 2000e-5(f).

investigation of a charge would unduly disrupt the Title VII enforcement scheme. Routine probing of the Commission's processes, like that sought by the petitioner here, would thwart congressional intent by resulting in " 'extensive delay in the disposition of Title VII cases' " (*id.* at A28 (quoting *EEOC* v. *K-Mart Corp.*, 694 F.2d at 1067)). The court of appeals therefore properly sustained the validity of 29 C.F.R. 1601.16(a).

There can be no doubt that, under the NLRB's subpoena policy, a request like petitioner's for a subpoena to explore the basis for an unfair labor practice charge during an investigation by the Board would be turned down under Section 161. Petitioner, however, argues that the same request, under the same statutory authority, made to the Commission during its investigation of a Title VII charge must be granted. The courts below properly rejected this result as contrary to evident congressional intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

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